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Model Law on Competition (2015) – Revised Chapter VIII[1]

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Some possible aspects of consumer protection

In a number of countries, consumer protection legislation is separate from restrictive business practices legislation.

Commentaries on chapter VIII and alternative approaches in existing legislation

Introduction

1. Both competition and consumer protection policies promote consumer welfare. The two policies address this goal from a different perspective; they are often mutually reinforcing yet there are important differences in how the two policies are executed.

2. Before dealing with the relationship between competition and consumer protection laws and policies, which is addressed in chapter VIII of the Model Law on Competition, it appears useful to provide some basic information on consumer protection.

Rationale for and contents of consumer protection legislation

3. Consumer protection legislation is based on the finding that consumers often face imbalances in economic terms, educational levels and bargaining power compared to the companies they deal with. Therefore, the typical consumer protection law seeks to prevent consumer welfare losses originated by this weaker position. The ways to achieve this objective differ significantly between different countries. Indeed, consumer protection legislation is much more diverse than competition laws. The United Nations Guidelines for Consumer Protection,[2] which provide guidance for the design of consumer protection legislation, recommend that such legislation address the following aspects:

(a) The protection of consumers from hazards to their health and safety;

(b) The promotion and protection of the economic interests of consumers;

(c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;

(d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;

(e) Availability of effective consumer redress;

(f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;

(g) The promotion of sustainable consumption patterns.

4. Some examples of how these different aspects may be translated into consumer protection legislation are provided in the following subsections.

[2] Department of Economic and Social Affairs, 2003, *United Nations Guidelines for Consumer Protection – as expanded in 1999* (New York, United Nations publication), available at http://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf (accessed 15 May 2015).

Product safety regulation

5. Product safety continues to be one of the key issues in consumer protection legislation. Product safety regulation has grown out of consumers' increasing expectations about the quality and safety of products that are supplied to them. Such expectations may be enhanced by increasing use of the Internet as a mechanism to quickly and easily research product and ingredient safety. For this reason, it is particularly important that consumers have faith in the protection provided by their national product safety systems. National safety regulations are usually complemented by national or international standards and the maintenance of safety records to ensure that products are safe for intended or normally foreseeable use. In some countries, such as Australia, product safety powers have recently been extended to also cover the reasonably foreseeable misuse of products. Australia may be considered an example of a country with a well-designed compliance and enforcement system for product safety regulations. In 2010, Australia introduced a nationwide harmonized product safety system, replacing separate state, territory and Commonwealth systems for regulating product safety, in order to enhance safety for citizens and reduce bureaucratic rules for businesses.[3] This reform attributed a range of new powers to the Australian Competition and Consumer Commission to promote product safety, including enforcing a mandatory reporting requirement that requires suppliers to file a report within 48 hours of becoming aware of a serious injury, illness or death associated with a product they supply. This reporting obligation also applies to suppliers of services associated with a consumer product. Product safety powers also include the ability to order a mandatory recall (including when a supplier no longer exists), issue a safety warning notice to alert the public to possible hazards and seize, embargo or otherwise contain non-compliant or unsafe goods. These powers of the Commission complement the expanded range of penalties that may apply when non-compliance with mandatory requirements is detected.

Protection from false or misleading information

6. Generally, the traditional purview of consumer protection legislation is the prevention of unfair trade practices. In this regard, there is much legislation preventing businesses or trade associations from disseminating false or misleading information about a product, whether on the label of the product or via a marketing campaign. For example, the Barbados Consumer Protection Act, 2002, states broadly that "a person shall not, in trade or commerce as a supplier, engage in conduct that is, or is likely to be, misleading or deceptive" (Chapter 326 D, section 12). The legislation goes on to list in section 13 a number of situations that could be deemed misleading or deceptive, for example falsely representing that goods are of a particular standard, falsely representing that goods have certain performance characteristics and misleading representations concerning the existence of conditions, warranties, rights or remedies relating to goods or services.

Control of standard contract terms

7. In some industries, businesses use standard form contracts with mandatory terms included that essentially compel a customer to accept the terms; the freedom of the consumer to contract and exercise his or her choice is therefore limited. Some countries have adopted regulations, for specified sectors, that dictate the compliance of business with standardized and/or model contracts. Other jurisdictions provide for a specific procedure in

[3] For more information on how the reforms were introduced see http://www.productsafety.gov.au/content/index.phtml/tag/ChangesInLegislation (accessed 15 May 2015).

order for such standard contract terms to be incorporated into a consumer contract, and allow for in-depth control of the respective terms by a judge. For instance, in line with the European Union directive on unfair terms in consumer contracts (93/13/EEC), the German Civil Code requires that, prior to concluding a consumer contract, the consumer be made aware of the incorporation of standard terms into the contract, and that he or she be given the possibility to read the relevant standard terms. Furthermore, standard contract terms in consumer contracts may be examined by a judge and declared void if they are unfair (see sections 305 to 310 of the German Civil Code). This control of contract terms constitutes a limitation on freedom of contract.

8. The European Union has adopted new directives in relation to consumer contracts. The directive on consumer rights (2011/83/EC), which entered into force in June 2014, replaces directives on the protection of consumers regarding distance contracts (97/7/EC) and protection of consumers regarding contracts negotiated away from business premises (85/577/EEC).[4] Nevertheless, the directive on certain aspects of the sale of consumer goods and associated guarantees (99/44/EC) and the directive on unfair terms in consumer contracts (93/13/EEC) remain in force. The new directive on consumer rights aims to protect consumers shopping online, and has the following 10 goals: to eliminate hidden charges and costs on the Internet; to increase price transparency; to ban preselected boxes on websites; to allow a consumer 14 days to change his or her mind on a purchase; to improve refund rights; to introduce a European Union-wide model withdrawal form; to eliminate surcharges for the use of credit cards; to introduce clear information on who pays for the return of goods; to improve protection concerning digital products; and to introduce common rules for businesses, facilitating intra-European trade.

9. Given the increasing prevalence of Internet use, it is important to take into consideration online contracts. Most countries are beginning to adopt new laws in this area, and the new European Union directive on consumer rights is a good example of this trend.

Information disclosure requirements

10. Given the need of consumers to have access to sufficient information in order to make an informed choice about the products and services they would like to purchase, and taking into account the imbalance of information between consumers and producers and distributors, it may be appropriate to mandate information disclosure by the latter two. For example, a rule may be designed to ensure that specified critical information is available to consumers, allowing consumers to make more informed decisions about which product or service to purchase. One example of a common disclosure requirement is the compulsory labelling of products. Food, in particular, often needs to be labelled in a detailed way, providing information that is crucial for consumer health.

11. If rules are focused on information availability, rules or systems must also be created so that consumers may process the complex information that is available. In designing rules, it should be remembered that information is not always key, as information overload may simply promote confusion and inertia. To complement an information disclosure rule, lawmakers may design functional systems that help consumers to process the information and may also be used for providing tips and tools to consumers.

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[4] For more information see European Commission, 2011, Consumer rights: 10 ways the new European Union consumer rights directive will give people stronger rights when they shop online, available at http://europa.eu/rapid/press-release_MEMO-11-450_en.htm?locale=en and European Commission, 2015, The directive on consumer rights, available at http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm (accessed 15 May 2015).

12. For example, the consumer scoreboard of the European Union is a system that investigates and monitors markets from the perspective of the consumer. An annual consumer scoreboard report is prepared, which provides information on price, complaints, safety, satisfaction and switching in consumer retail markets. Data and attitudes of consumers vis-à-vis cross-border trade, with a view to tracking progress in retail market integration, are catalogued. Data are also catalogued on enforcement, redress and the handling of complaints, with the aim of establishing consumer conditions at the European Union level and member State level. Data are collected using European Union-wide surveys and are then processed and analysed. The consumer scoreboard data are expected to help in the enforcement of existing legislation and in the design of targeted codes of conduct for businesses, and will also be used to empower consumers with clear and manageable information, in order to make choices, avoid fraud and exercise their rights.[5]

Mandatory codes of conduct or rules of behaviour

13. In addition to mandating certain rules of behaviour, there appears to be a growing trend towards encouraging businesses to self-regulate, subject to the approval of the consumer protection agency or other relevant agencies.

14. For instance, the Consumer Codes Approval Scheme in the United Kingdom of Great Britain and Northern Ireland aims to reinforce consumer protection and improve customer service standards by approving and promoting codes of practice, setting out principles of effective customer service and recognizing approved traders. The scheme was managed by the Office of Fair Trading in the past; since April 2013 it has been managed by the Trading Standards Institute (see http://www.tradingstandards.gov.uk). For a code to be approved by the Institute, certain criteria must be met, such as the provision of clear precontractual information, protection of prepayments, dealing with consumers in their own home, monitoring procedures and independent dispute resolution schemes. Changes to the Consumer Codes Approval Scheme under the Institute have been made in the following areas: code approval criteria, strengthened to ensure that approved codes of practice actively reduce consumer detriment; addition of the criterion on dealing with consumers in their own home; monitoring of code members; deposit and prepayment protection; provision of eight weeks for informal resolutions; strengthening of alternative dispute resolutions; and enforcement and scope.

15. In Japan, the Law Against Unjustifiable Premiums and Misleading Representations (Act No. 134, 1962) also provides for self-regulation. Article 11 of the Act states that an "entrepreneur or a trade association may, upon obtaining authorization from the Prime Minister and the Fair Trade Commission pursuant to Cabinet Office Ordinance, with respect to the matters relevant to premiums or representations, conclude or establish an agreement or a rule, aiming at prevention of unjust inducement of customers and securing general consumers' voluntary and rational choice-making and fair competition between entrepreneurs. The same shall apply in the event alterations thereof are attempted".

16. Similarly, the Australian Competition and Consumer Commission regulates five mandatory industry codes that are prescribed under the Competition and Consumer Act, 2010. The Commission also provides guidance to industries seeking to develop their own voluntary industry codes (see https://www.accc.gov.au/business/industry-codes).

[5] European Commission, 2008, Monitoring consumer outcomes in the single market – the consumer markets scoreboard, available at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008DC0031 (accessed 15 May 2015).

Functioning of competition and consumer protection legislation

17. As noted in the introduction, both competition and consumer protection legislation act to promote consumer welfare, yet they do so in different ways. Competition law promotes competitive behaviour (rivalry, independent behaviour and incentives to develop better offers of goods and services) leading to a range of choices and options in services and goods available to consumers. Consumer protection law empowers consumers to exercise choice among available options according to their preferences and interests. Competition legislation should benefit consumers, but it is often not direct in this regard; it uses a set of rules, in a general and uniform manner, to bring about benefits to the market as a whole. Consumer protection laws, however, use targeted rules, at times addressed to specific sectors, to create a more empowered, informed and advantaged consumer. Finally, competition law normally deals with specific situations that have a significant effect on the competitive process of a market, whereas consumer protection law deals with effects on both individuals and consumers collectively, but is not always concerned with the process of competition in the market.

18. Competition law rules are squarely directed at the market and are designed to regulate the way firms compete with each other in a market, with a view to promoting competition among firms and thereby enhancing consumer choice. Consumer protection law has a more diverse range of rules that address the conduct of firms and the standards by which they operate, as well as the rules of engagement between individual businesses and consumers, with a view to promoting access to goods and services, promoting greater quality in the choice available and ensuring consumer access to reliable and undistorted information to assist consumers in making that choice. Whereas the benefit of competition law is usually quantified in economic terms, the benefit of consumer protection law may be economic and may also engender non-economic quantities of value such as the safety and health of the consumer. The subjects of the rules are therefore sometimes different.

19. As a matter of general application of the law, competition laws have an applicable limit in the sense that competition rules of exclusionary conduct and collusion cannot be manipulated to bring about change in a particular sector or in the structure of a particular market. The rules are generally applied uniformly across the board. Consumer protection laws, on the other hand, may be used to impose rules of behaviour on firms in a particular sector to give consumers better information on choice, access to safer goods and redress in the case of misleading contract terms. In addition, consumer protection law concerns rights protection at the level of an individual transaction, providing such protection against a range of abuses, whereas competition law occurs at the level of the marketplace, carrying out its agenda by promoting consumer interests not at the transactional level but at the level of the competitive process in the relevant market.

20. With respect to the design of remedies, it is important to note that consumer protection law remedies may be far more targeted than competition law remedies. The remedies of consumer protection law, as with the prescribed rules, may go beyond fines and the prohibition of conduct. As such, a wide array of tools may be employed in this regard. For example, restitution via compensatory damages is one option, as are prevention and deterrence via fines, punishment via imprisonment and suspension of business licences. With regard to restitution in particular, since consumer protection law is usually grounded in the principles of fairness and balance of rights, restitution will be one of the more effective remedial tools. For example, restitution allows remedies to develop in a less rigid manner, allowing for the particular facts of the case to dictate an equitable outcome for both a firm and a consumer. As a general guide to remedy design, it should be noted that one key

element in determining the choice of remedy in consumer protection law appears to be that the magnitude of the sanction must outweigh the opportunistic infringing conduct.[6]

21. However, one area's remedies may sometimes have implications in the other domain. For instance, consumer legislation usually includes the development of standards to protect consumer interests. Yet if standards are set too high, they may exclude safe but lower quality competing products.

22. While acknowledging the different modes of functioning of competition and consumer protection laws, it should be remembered that competition issues are closely related to the protection of consumers' economic interests. For instance, Canada has acknowledged how the policies enhance each other, stating that the "reference to consumers in the purpose clause of the Competition Act reflects Parliament's appreciation that a properly functioning marketplace requires not only enforcement against market power abuses, but also transparency in information provided to consumers to promote well-informed purchasing decisions. Hence, consumer and competition policy are mutually reinforcing".[7]

The interface between competition and consumer protection law[8]

23. The coverage of consumer protection laws differ. The United Nations Guidelines do not define a consumer. While consumer protection laws generally cover natural persons in their household setting, some laws extend coverage to natural persons in their roles as sole proprietors or subsistence farmers.[9] It is argued that the concerns related to health, safety, economic interests, asymmetric information, cognitive biases and access to redress are similar in these settings to those in a household setting.

24. Policy tools partially overlap, as both use market studies, advocacy, guidelines and law enforcement. Indeed, authorities have found that market studies and/or sector enquiries are extremely useful as a dual competition and consumer protection tool. Consumer investigations are apparently more numerous but less resource intensive. This has been recognized by a number of authorities as an opportunity to fully develop team skills applicable to more frequently observed cases in the area of consumer protection, which may later be applied in the area of competition. Consumer authorities also partner with consumer organizations to deliver information and advice to consumers and provide consumer redress.[10]

25. Responsibility for competition and consumer protection policies may lie with separate agencies or a common agency. In addition, it may be either general or sector

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[6] K Cseres, 2009, Competition and consumer policies: Starting points for better convergence, Working Paper No. 2009-06, Amsterdam Centre for Law and Economics, available at http://ssrn.com/abstract=1379322 (accessed 15 May 2015).

[7] Organization for Economic Cooperation and Development, 2008, Policy round tables: The interface between competition and consumer policies, available at http://www.oecd.org/regreform/sectors/40898016.pdf (accessed 15 May 2015).

[8] For a comprehensive overview, see TD/B/C.I/EM/2.

[9] For instance, section 2 (1) (d) of the Consumer Protection Act, 1986, of India provides the same protection to goods and services purchased for earning a livelihood as those purchased for personal or household consumption. For other examples, such as from China and the Philippines, see UNCTAD, 2010, approaches to consumer redress.

[10] One concern is the appropriateness of the media used to deliver consumer education to a target group. Elderly, illiterate or minority-language inhabitants may need different approaches than urban Internet-savvy youth.

specific, for example a telecommunications regulator may also be responsible for competition and consumer protection policies in that sector, as takes place in Zambia. In addition, financial regulators in many countries have been given the main role in the protection of consumers in this sector. The respective agencies may cooperate through sharing or referring complaints or information. When a complaint is received, it may be unclear whether the concern is better addressed in a competition or consumer protection framework, raising coordination challenges. In addition, consumer organizations may report not just consumer but also competition problems. Forwarding complaints and sharing the results of investigations, where appropriate, between agencies responsible may make it easier to apply the most suitable policy framework. Greater institutional cooperation between competition and consumer protection policy authorities may engender better coordination of investigations and remedies.

26. Given the common goals of competition and consumer protection policy and law, and taking into account their significantly different ways of functioning, the question arises of how to design their interface, on both the legislative and the enforcement levels.

Legislative level

27. Chapter VIII of the Model Law on Competition states that in a number of countries, consumer protection legislation is separate from competition legislation. The present trend in countries adopting such legislation seems to be the enactment of two separate laws, one on competition and the other on consumer protection. For example, in young competition regimes, such as those of Barbados, Jamaica and Mongolia, and at the community level in the Caribbean Community, competition law and consumer protection law are dealt with under separate legislation. The same applies in Brazil, Chile, Morocco and Switzerland, among others. In some countries and regions, however, such as Australia, France, Hungary and Poland, and in the regional law of the Caribbean Community, the competition law contains a chapter devoted to consumer protection. This also applies, for example, in Lithuania and the Bolivarian Republic of Venezuela, where the competition laws contain regulations on unfair trade practices. In Canada, the Competition Act contains provisions dealing with misleading advertising and deceptive marketing practices, designed to ensure that consumers are provided with basic, uniform and accurate information on certain consumer products and to proscribe deceptive and false representations.

Enforcement level

28. The approach reflected by the Model Law on Competition – that of drafting two separate laws – does not prevent a coordinated approach to policy development, and although consumer protection legislation may be developed separately from competition legislation, the laws may be enforced in a coordinated way, which allows the policies to complement and reinforce one another. In addition, because of the links between the two bodies of law, the administration of these laws is often the responsibility of the same authority. This applies, for example, in Australia, Colombia, Finland, Italy, Mongolia, Panama, Peru, Poland, Sri Lanka, the United Kingdom, the United States of America and Zambia.

29. In other jurisdictions, the administration of competition and consumer protection laws is attributed to different authorities. For instance, in Chile and Estonia, consumer protection legislation and the consumer protection authority are separate from competition legislation and the competition authority. In Estonia, the Competition Act also contains provisions on unfair trade practices, contraventions of which are determined by a civil court.

30. The trend in institutional design seems to be to combine the consumer protection agency with the competition authority. There are many countries including their competition authorities with their consumer protection agencies, even though a separate department is created for each agency in most instances, for example in Australia, Barbados, Burkina Faso, Canada, Colombia, Denmark, Jamaica, Malta, Mongolia, Papua New Guinea, Poland, Seychelles, the United Kingdom, the United States and Zambia, among others.

31. Since 2010, the trend to include both the competition and consumer protection agencies in the same institution has become even more pronounced. In recent years, some countries have merged their competition and consumer protection agencies into a single institution, for example Finland (Competition and Consumer Authority) and the Netherlands (Authority for Consumers and Markets) in 2013 and Ireland (Competition and Consumer Protection Commission) in 2014.

32. Designing a competition authority of dual competence – competition law enforcement and consumer protection – may create synergies if there is effective coordination. For example, the dual competence of an agency gives rise to centralized management, operational efficiencies, case teams with a range and diversity of disciplines and the efficient use of available expertise. It is sometimes difficult to coordinate the procedures for a law that applies at the individual consumer level with those for a law that applies at the market level, and it is sometimes difficult to coordinate the laws at the case level.[11] Despite such difficulties, there is increasing recognition that competition and consumer policies reinforce each other in achieving their goals and the two policies should therefore be coordinated to facilitate a whole-market approach and that competition and consumer authorities should share information and coordinate enforcement and advocacy measures. The decision of the Netherlands Authority for Consumers and Markets to fine an airline for unfair commercial practices is an example of the enforcement of consumer protection law not only following consumer complaints but also complaints from competitors of the airline. Consumer law enforcement may thus strengthen competition by addressing unfair commercial practices.[12]

33. Despite the trend towards dual competence, there is nothing to prevent lawmakers from housing the agencies separately. It should be noted that even where there are separate agencies, it is possible to coordinate the activities of both agencies either in specific areas or common cases or through the establishment of an oversight committee or central commission that comprises representatives from the competition authority and the consumer protection agency, as well as individuals from other government departments and ministries.[13]

[11] Organization for Economic Cooperation and Development, 2008.
[12] TD/B/C.I/CLP/27.
[13] Organization for Economic Cooperation and Development, 2008.

Alternative approaches in existing legislation

34. Alternative approaches in existing legislation and enforcement authorities are detailed in the table.

Country or group by region	*Legislation*	*Enforcement*	
		Competition	*Consumer protection*
Europe			
1. Netherlands	The Competition Act and Consumer Protection Act are separate	Authority for Consumers and Markets	
2. Spain	Competition and consumer protection legislation are separate	National Commission of Markets and Competition	National Institute of Consumers
3. European Union	Competition and consumer protection legislation are separate	European Commission: Directorate-General Competition and Directorate-General Justice for consumer protection	
Latin America			
4. Chile	Competition and consumer protection legislation are separate	National Economic Prosecutor and Tribunal for the Defence of Free Competition	National Consumer Service
5. China	Competition and consumer protection legislation are separate	State Administration for Industry and Commerce[14] National Development and Reform Commission Ministry of Commerce	
6. Mexico	Competition and consumer protection legislation are separate	Federal Economic Competition Commission	Federal Consumer Protection Commission
North America			
7. Canada	The Competition Act covers both competition and consumer protection	Competition Bureau	
8. United States	Competition and consumer protection legislation are separate	Federal Trade Commission	
Africa			
9. South Africa	Competition and consumer protection legislation are separate	Competition Commission and Competition Tribunal	Consumer Commission and Consumer Tribunal

[14] Within the Administration, the departments responsible for enforcing the competition law are the Anti-monopoly Bureau and Anti-unfair Competition Enforcement Bureau and the department responsible for enforcing the consumer law is the Consumer Protection Bureau.

Country or group by region	*Legislation*	*Enforcement*	
		Competition	*Consumer protection*
10. Zambia	Before 2010, the Competition Act was separate from consumer law. Competition and Consumer Protection Act No. 24, which includes both competition and consumer protection provisions, entered into force in 2010 and established a single enforcement agency with dual competence	Competition and Consumer Protection Commission	
Asia-Pacific			
11. Australia	The Competition and Consumer Act, 2010, covers both competition and consumer protection	Australian Competition and Consumer Commission	
12. India	Competition and consumer protection legislation are separate	Competition Commission of India and Competition Appellate Tribunal	The Department of Consumer Affairs is responsible for the formulation of consumer protection policy and the National Consumer Disputes Redressal Commission is in charge of implementing the Consumer Protection Act, 1986